

From: "David Conrad" <CONRAD@nwf.org>
To: <awaters@gp.usbr.gov>
Date: 3/26/2008 5:11:22 PM
Subject: Comments on the NAWS DEIS

Dear Ms Waters, please include these comments of the National Wildlife Federation for the record regarding the Bureau of Reclamation's Northwest Area Water Supply Project Draft EIS, December, 2007. We appreciate the opportunity to participate in this proceeding. Thank you, Sincerely, David R. Conrad, Senior Water Resources Specialist, National Wildlife Federation.

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**COMMENTS OF
NATIONAL WILDLIFE FEDERATION
ON THE
U. S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
GREAT PLAINS REGION
DAKOTAS AREA OFFICE**

DECEMBER 2007

**NORTHWEST AREA WATER SUPPLY PROJECT
DRAFT ENVIRONMENTAL IMPACT STATEMENT
ON WATER TREATMENT**

Prepared by

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and

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March 26, 2008

INTRODUCTION

On December 21, 2007, the U. S. Bureau of Reclamation (Bureau) Great Plains Regional Office released a *Northwest Area Water Supply Project Draft Environmental Impact Statement on Water Treatment* (Draft EIS). Under “Proposed Action,” the Draft EIS states:

“Reclamation proposes to construct a biota water treatment plant (WTP) for the Project to treat the source water from Lake Sakakawea before it is delivered into the Hudson Bay drainage. Four alternative courses of action have been developed to further reduce the risk of transferring potentially invasive species from the Missouri River basin to the Hudson Bay basin. . . .” (Draft EIS, p. 1-5)

In its October 22, 2002, Complaint in Government of Manitoba v. Norton et al. challenging the adequacy of the 2001 Environmental Assessment (EA) for the Northwest Area Water Supply (NAWS) Project prepared by an engineering consulting firm with long-standing relationships with the North Dakota State Water Commission and the Garrison Diversion Conservancy District, and the 2001 Finding of No Significant Impact (FONSI) prepared by the U. S. Bureau of Reclamation, the Government of Manitoba asked the United States District Court for the District of Columbia to issue a declaratory judgment requiring the defendants to:

“ . . . prepare, make available for public comment and consider in their decision-making process an EIS [Environmental Impact Statement] on the NAWS Project in accordance with Section 102(2)(C) of NEPA [National Environmental Policy Act] and its implementing regulations.”

In her February 3, 2005, Memorandum Opinion, United States District Court Judge Rosemary M. Collyer stated:

“Until BOR [Bureau of Reclamation] has completed a more thorough EA, the question of whether an EIS is required remains open and the Court will not grant the request for declaratory and injunctive relief requiring production of an EIS. **The decision to issue an EIS is committed to the agency’s discretion** and any judicial review of a substantive finding of no significant impact is deferential [citations omitted]. The Court has identified a preliminary deficiency in the agency’s decision not to issue an EIS—a limited finding that the agency has failed to take a ‘hard look.’ A determination of whether the agency’s failure to issue an EIS is supportable would be premature.

Although it will not order production of an EIS, the Court notes that Manitoba has raised the specter of **significant environmental consequences that deserve serious consideration.** . . .” (Emphasis added)

In her Memorandum Opinion, Judge Collyer specifically noted that:

“Federal Defendants argue that the risks of leakage are low and, therefore, that no further study is necessary. They repeatedly provide varied estimates that more than ninety-nine percent of biota will be disinfected under NAWS. While facially compelling, the argument ignores the fact that certain biota have been identified that may be impervious or highly-resistant to the planned treatment. Therefore, **even a low risk of leakage may be offset by the possibility of catastrophic consequences should leakage occur. Without some reasonable attempt to measure these consequences instead of bypassing the issue out of indifference, fatigue, or through administrative**

legerdemain, the Court cannot conclude that BOR took a hard look at the problem.”
(Emphasis added)

Therefore, Judge Collyer:

“. . . **Ordered** that the case be **REMANDED** to the agency for completion of an **Environmental Assessment** that considers an integrated analysis of the **possibility** of leakage **and the potential consequences** of the failure to fully treat the Missouri River at its source given the agency’s awareness of treatment-resistant biota. After doing so, the agency is **ORDERED** to revisit its finding of no significant impact.” (Emphasis of non-capitalized words added)

On March 6, 2006, the Bureau issued a Notice of Intent in the *Federal Register*.

“The notice announced Reclamation’s intent to prepare an **Environmental Impact Statement** (EIS) to address issues identified in the Court order and evaluate **water treatment alternatives** that would further reduce the risk of transferring invasive species from the Missouri River drainage to the Hudson Bay drainage through the construction and operation of the Project. When completed, this EIS will fulfill the Courts [sic] order for an integrated analysis of pipeline leakage **and potential consequences** of the failure to fully treat the Missouri River water prior to crossing the basin divide into the Hudson Bay drainage.” (Emphasis added) (Draft EIS, pp. 1-4, 1-5)

In its April 2006 *Reclamation Managing Water in the West* brochure on Public Scoping of the Northwest Area Water Supply Project Environmental Impact Statement, the Bureau’s Dakota Area Office stated that:

“The Bureau of Reclamation will prepare an Environmental Impact Statement on the Northwest Area Water Supply (NAWS) **Project**. . . **This Federal action** is subject to requirements of the National Environmental Policy Act (NEPA).” (Emphasis added)

Therefore, the Court had noted that “the specter of significant environmental consequences that deserve serious consideration” had been raised, but stated that “the decision to issue an EIS is committed to the agency’s discretion.” The Bureau then made a decision to prepare an EIS on the NAWS project “subject the requirements of the National Environmental Policy Act.” Section 102(2)(C) of the National Environmental Policy Act specifies that all agencies of the Federal Government shall:

“(C) include in every recommendation or report on proposals for legislation or any other major Federal actions significantly affecting the quality of the environment, a detailed statement by the responsible official on—

- (i) the **environmental impact of the proposed action**,
- (ii) any adverse environmental effects which cannot be avoided should the proposed action be implemented,
- (iii) **alternatives to the proposed action**,
- (iv) the relationship between the local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) **any irreversible and irretrievable commitments of resources** which would be involved in the proposed action should it be implemented.”

(Emphasis added)

When the Bureau made the decision “to prepare an Environmental Impact Statement on the Northwest Area Water Supply Project. . . subject to the requirements of the National Environmental Policy,” it made a commitment to do exactly that, i.e., prepare a detailed statement on the environmental impacts of the NAWS Project, alternatives to the NAWS Project, and any irreversible and irretrievable commitments of resources resulting from the construction and/or operation of the NAWS Project.

It should be noted again that Judge Collyer’s Order specifically remanded the case to the Bureau:

“. . . for completion of an **Environmental Assessment** that considers an integrated analysis of the **possibility** of leakage and the **potential consequences** of failure to fully treat Missouri River water at its source. . .” (Emphasis added)

In her Memorandum Opinion, Judge Collyer made a separate determination that:

“Until BOR has completed a more thorough EA, the question of whether an EIS is required remains open. . . **The decision to issue an EIS is committed to the agency’s discretion.** . . .”

Although it will not order production of an EIS, the Court notes that Manitoba has raised the specter of **significant environmental consequences that deserve serious consideration.** . . .” (Emphasis added)

Given that it was the Bureau’s decision to prepare an Environmental Impact Statement for the NAWS Project, for the EIS to comply with the requirements of the National Environmental Policy Act, it clearly would have to demonstrate serious consideration of the potentially significant environmental consequences of the project. In addition, the courts have held that a thorough consideration of alternatives is central to the purpose of NEPA. For example, in Calvert Cliffs v. Atomic Energy Commission (2 ERC 1779) 449 F.2d 1109 (D.C. Cir., 1971), cert. denied 404 U.S. 942 (1972), the U. S. Court of Appeals for the District of Columbia found, regarding the consideration of alternatives in the EIS, that:

“This requirement, like the ‘detailed statement’ requirement, seeks to insure that each agency decision-maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would **alter the environmental impact** and the cost-benefit balance. **Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.** . . .” (Emphasis added)

The same U.S. Court of Appeals also held in Natural Resources Defense Council v. Morton (3 ERC 1473, 1558, 1623) 337 F.Supp. 165 (D.DC., 1971), 337 F.Supp. 167 (D.DC., 1971), 458 F.2d 827 (DC Cir., 1971) 337 F.Supp. 170 (D.DC., 1972), that Federal agencies may not disregard alternatives simply because they “do not offer a complete solution to the problem.”

In NRDC v. Morton, the U. S. Court of Appeals stated that:

“Congress contemplated that the impact statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of and by the public. The impact statement provides a basis for (a) **evaluation of the benefits of the proposed action in light of its environmental risks,**

and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.” (Emphasis added)

In *Environmental Defense Fund v. Corps of Engineers (Gillham Dam)* (2 ERC 1260, 4 ERC 1097, 1721 5 ERC 1416 325 F.Supp. 728 (D.EArk., 1971), 342 F.Supp. 1211 (D. Eark., 1972), 470 F.2d 289 (8th Cir., 1972), cert denied, 412 U.S. 908 (June 4, 1973), the District Court held that the range of alternatives to be considered must extend from the alternative of rejecting the proposed action up to and including **alternatives that would fully accomplish the goal of the proposed action but would avoid all of its objectionable features.**

Finally, the Courts have consistently rejected Environmental Impact Statements when they have covered such a small part of an overall project that the proper discussion of alternatives was precluded. (See, e.g., *Committee to Stop Route 7 v. Volpe* (4 ERC 1329, 1681) 346 F.Supp. 731 (D. Conn, 1972) F.Supp. (D. Conn. 1972); *Keith v. Volpe* (4 REC 1350, 1562) - - F. Supp. - - (D. Ccal., 1972) - - F.Supp. - - (D. Ccal., 1972); *Indian Lookout Alliance v. Volpe* (4 ERC 1449 5 ERC 1749, 345 F.Supp. 1167 (D. SIowa, 1972), 484 F.2d 11 (8th Cir, 1973).

However, instead of preparing an adequate EIS that addresses the potentially significant environmental impacts of the NAWS Project and discusses alternatives to the Project that would avoid its objectionable features, the Bureau has attempted to circumvent the Court’s Memorandum Opinion and Order and the National Environmental Policy Act by preparing a Draft EIS but limiting it to the narrow issue of evaluating:

“water treatment alternatives that would further reduce the risk of transferring invasive species from the Missouri River drainage to the Hudson Bay drainage through the construction and operation of the Project.” (Emphasis added) (Draft EIS, p. 1-4)

Consequently, the *Northwest Area Water Supply Project Draft Environmental Impact Statement of Water Treatment* is deliberately and specifically designed to preclude the thorough evaluation of alternatives to the NAWS Project that is required by NEPA.

ENVIRONMENTAL IMPACT ANALYSIS

As noted above, in her February 3, 2005, Memorandum Opinion, Judge Collyer explicitly pointed out that:

“ . . . even a low risk of leakage may be offset by the possibility of catastrophic consequences should leakage occur. Without some reasonable attempt to measure these consequences instead of bypassing the issue out of indifference, fatigue, or through administrative legerdemain, **the Court cannot conclude the BOR took a hard look at the problem.**” (Emphasis added)

Consequently, in her Order, Judge Collyer specifically directed the Bureau to prepare an environmental impact document:

“that considers an integrated analysis of the possibility of leakage and the potential consequences of the failure to fully treat the Missouri River at its source. . .” (Emphasis added)

However, the Draft EIS simply presents another risk analysis concluding that:

“The risks of transferring invasive species via the Project’s facilities have been carefully estimated and are on the low to very low end of the scale.” (Draft EIS, p. 4-17)

Although the Draft EIS acknowledges that:

“Because of the number and complexity of competing pathways, **it is difficult to quantify the risk of transferring invasive species through non-Project pathways.**” (Emphasis added) (Draft EIS, p. 4-13)

it nevertheless concludes that:

“The probability of Project-related biological invasions **was much lower** and less variable **than for any of the competing non-Project pathways** considered in the simulation.” (Emphasis added) (Draft EIS, p. 4-13)

Of course, if the risk of transferring invasive species through non-Project pathways cannot be reliably determined, any comparison of the risks from non-Project pathways with the risk of Project-related invasions will be correspondingly unreliable.

However, the most obvious deficiency of the Draft EIS’s analysis of the environmental impacts of the NAWS Project is its defiant rejection of Judge Collyer’s explicit order to take a hard look at the potential consequences of the introduction of invasive species from the Missouri River Basin into the Hudson Bay Basin as a result of the NAWS Project. Instead, the Bureau obdurately continues to bypass the issue through deliberate administrative legerdemain. For example, instead of addressing Judge Collyer’s conclusion that “even a low risk of leakage may be offset by the possibility of catastrophic consequences” so “[w]ithout some reasonable attempt to measure these consequences. . . the Court cannot conclude that the BOR took a hard look at the problem,” after acknowledging that:

“An interbasin water transfer could provide a pathway for introducing invasive aquatic species to the Hudson Bay basin.” (Draft EIS, p. 4-5)

the Bureau cavalierly dismisses the Judge’s concerns with statements such as:

“The statutory provisions of NEPA (and Council on Environmental Quality’s regulations implementing NEPA) do not require the assessment of environmental impacts within the territory of a foreign country; therefore this type of evaluation is considered outside the scope of the EIS.” (Draft EIS, p. 1-9)

Consequently, there simply is no discussion anywhere in the Draft EIS of the potentially catastrophic consequences of the introduction of invasive species from the Missouri River Basin into either the Canadian or U.S. portions of the Hudson Bay Basin by the NAWS Project (including waters and ecosystems in North Dakota such as the Des Lacs, Upper Souris and J. Clark Salyer National Wildlife Refuges and waters of the Red River Basin).

CUMULATIVE ENVIRONMENTAL IMPACTS

The same day (December 21, 2007) that the Bureau released its *Northwest Area Water Supply Project Draft Environmental Impact Statement on Water Treatment*, it also released a *Final Environmental Impact Statement, Red River Valley Water Supply Project*, identifying as its preferred alternative the Garrison Diversion Unit Import to Sheyenne River, which would deliver 810,450 acre-feet of water from the Missouri River to the Hudson Bay Basin during the 10-year course of a 1930s-type drought. The NAWS project is authorized to deliver 15,000 acre-feet of water annually from the Missouri River to the Hudson Bay Basin (Draft EIS, p. 1-1), or a total of 150,000 acre-feet during a 1930s-type drought, bringing the total diversion of Missouri River water to the Hudson Bay Basin in a 1930s-type drought to 960,450 acre-feet from just these two projects alone. However, the NAWS Draft EIS does not address the cumulative impacts on the Missouri River of these two projects, along with the scores of other public and private projects that withdraw water from the river.

Despite the Bureau's having just endorsed the Garrison Diversion Unit Import to Sheyenne River as the preferred Red River Valley Water Supply Project alternative, the Bureau's NAWS Project Draft EIS simply dismisses the issue of cumulative impacts with the patently false statement that:

“No other federal, state or local government actions in the Project area that would cumulatively lead to increased risk of transferring invasive species were identified.”
(Draft EIS p. 4-17)

Clearly, even if the risks of invasive biota transfer were low in each project, those risks would be cumulative.

ALTERNATIVES

The attached *Comments regarding scooping of the Draft Environmental Impact Statement for the Northwest Area Water Supply Project* pointed out specifically that:

“Section 102(2)(C)(iii) [of the National Environmental Policy Act] specifies that Environmental Impact Statements are to address ‘alternatives to the proposed action,’ and Council on Environmental Quality Regulations and the courts have made it clear that Federal agencies are not simply to consider alternatives for implementing the proposed action, but they are to explore all reasonable alternatives to the proposed action . . .

The EA for the NAWS project considered alternatives **FOR** supplying Missouri River water to eleven communities and five rural water systems in the Hudson Bay Basin of North Dakota, but it did not seriously consider alternatives **TO** supplying Missouri River water to those communities and rural water systems. The EA acknowledged that ‘sufficient groundwater supply is available in nearly every location of the NAWS area,’ but the only alternative other than using Missouri River water considered in the EA was to drill more wells for six communities and to construct 18 separate reverse osmosis systems, one for each of the 13 communities (except Parshall) and five rural water systems in the NAWS project area.

Certainly, construction of 18 individual reverse osmosis systems to serve communities as small as Columbus (pop. 223), Noonan (pop. 231) and Souris (pop. 97) would be among the least feasible groundwater alternatives that could be designed (because a multitude of individual facilities would fail to take advantage of the economies of scale of larger, more

consolidated facilities). Even so, according to the EA, this alternative would cost only \$27 million more than the preferred alternative utilizing an integrated Missouri River supply for the communities and rural water systems located in the Hudson Bay Basin. However, neither the EA nor the reports it cites considers alternative configurations utilizing integrated groundwater supplies that would reduce the number of wells and reverse osmosis systems needed.

For example, according to the EA, the projected 2010 combined 47,095 population of Minot and the Minot Air Force Base is 82 percent of the total combined population of the communities and rural water systems in the Hudson Bay Basin to be supplied with Missouri River water under the NAWS project. Therefore, one obvious alternative would be to increase the supply from the Sundre Aquifer¹ and the capacity of the Minot water treatment by 21 percent to provide water to the additional 10,114 people in the small communities and rural water systems in the Hudson Bay Basin to be served by the NAWS project. Water could be distributed to those communities and rural water systems through the same 304 miles of distribution pipelines that would be used to deliver Missouri River to them under the preferred alternative, and the cost savings from not building 45 miles of pipeline from the Missouri River and not building and operating the biota treatment plant could be used to expand the Minot water treatment facility. Of course, other alternatives utilizing integrated groundwater supplies should also be discussed and evaluated in the Environmental Impact Statement.

It should be noted in this context that the fact that the Bureau violated NEPA by not adequately considering alternatives to the proposed action in the EA for the NAWS project may not be cited as an excuse for continuing to fail to evaluate alternatives to the proposed action in the Environmental Impact Statement. Consequently, the Bureau may not cite the fact at construction already is underway on the pipeline from the Missouri River to Minot to justify not considering alternatives **TO** the construction of a pipeline from the Missouri River to Minot.

¹ The 15,000 acre-feet per year maximum permitted withdrawal from the Missouri River for the NAWS project would be equivalent to 13,368,898 gallons per day. The 1970 *Preliminary Report on the Ground-Water Conditions In the Vicinity of Minot, North Dakota* prepared by Wayne A. Pettyjohn of Columbus, Ohio, and published by the City of Minot City Manager's Office determined that, "In general, the quality of water in the Sundre aquifer is good for drinking and many industrial purposes. It contains less dissolved minerals than several of the existing municipal wells." And, "That part of the Sundre aquifer in Township 154 North and Ranges 81 and 82 East contains a huge volume of water in storage. . . This underground reservoir, as it extends from the south end of Minot to the McHenry County line contains more than 384,000 acre-feet of water. At a withdrawal rate of 6 mgd [million gallons per day], and no recharge to the aquifer, this quantity would last for more than 50 years!" Therefore, just the portion of the Sundre Aquifer south of Minot alone could provide nearly half of the maximum annual water supply for the NAWS project for 50 years, even if there were no recharge of the aquifer. However, the Pettyjohn Report goes on to state that, "Future pumping from wells tapping the lower aquifer will result in induced infiltration from the Souris River to the Lower Souris aquifer and from the Lower Souris Aquifer into the Sundre aquifer. This, in turn, means that large areas are available for natural recharge. In fact, more than 28 square miles provided recharge during the pumping test." Consequently, with normal recharge, the portion of the Sundre Aquifer south of Minot could provide an even greater portion of the water supply for the NAWS project. Additional groundwater sources include continued use of the Minot Aquifer and development of the portion of the Sundre Aquifer northwest of Minot and the Lower Souris Aquifer. According to the Pettyjohn Report, "The quality of water in the Lower Souris aquifer is suitable for most municipal and industrial uses." And, "Properly constructed, fully-penetrating wells could produce as much as 1,000 gpm with about 12 feet of drawdown."

Unfortunately, however, that is exactly what the Bureau is proposing to do in the Dakotas Area Office's *RECLAMATION Managing Water in the West, Northwest Area Water Supply Project* on "Environmental Impact Statement: Public Scoping," which states:

"Reclamation proposes to study and evaluate alternative water treatment methods to minimize the risk of transferring non-native biota from the Missouri River Basin to the Hudson Bay Basin through the NAWS project."

(Emphasis added)

Although the Bureau's decision to prepare an Environmental Impact Statement on the NAWS project is the result of a ruling by the U.S. District Court for the District of Columbia in a suit brought by the Province of Manitoba challenging the adequacy of the EA's discussion of impacts of the project in Canada and alternatives for minimizing those impacts, NEPA requires a full exploration of all reasonable alternatives **TO** delivering Missouri River water to the Hudson Bay Basin. The alternative of development of groundwater resources within the Souris River basin has the potential to entirely avoid creating the water pathway for transfer of invasive species to the Hudson Bay drainage that is inherent in the Missouri importation approach. Failure of the Environmental Impact Statement to address alternatives to the current NAWS project, including utilizing water supplies within the Hudson Bay Basin, objectively and substantively will render it inadequate under the National Environmental Policy Act and Council on Environmental Quality Regulations, and make it vulnerable to further litigation.

Nevertheless, the Draft EIS continues to consider only alternatives **for** treating Missouri River water delivered to the Hudson Bay Basin by the NAWS Project, and it fails to consider any alternatives **TO** the delivery of Missouri River water to the Hudson Basin. Consequently, not only does the Draft EIS cover such a small portion of the overall NAWS project as to preclude a proper discussion of alternatives, but it also precludes consideration of alternatives that would avoid all of the NAWS Project's objectionable features.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENTS OF RESOURCES

The Mitchell, South Dakota *Daily Republic* reported in a December 15, 2007, story that:

"There are 27 tribes in the Missouri River basin. If all of their water rights are quantified, predicted Dale Frink, one of North Dakota's representatives at this week's MoRAST meeting in Pierre, they could secure rights to an enormous amount of water.

'If they all would do it, they would tie up a chunk of water, if not all of it,' said Dale Frink, an engineer with the North Dakota State Water Commission. 'I don't know if I should say "tie up," but certainly they could quantify a huge amount of water.'

(Emphasis added)

The Draft EIS for the NAWS Project acknowledges that:

"... there could be a potential Indian water rights issue." (Draft EIS, p. 4-25)

but instead of addressing this very significant issue substantively, the Draft EIS summarily dismisses it with three brief and cursory paragraphs:

“Water Rights

If Missouri River tribes quantify their reserved water rights and put the water to beneficial use, the volume of water available for other users in the basin may be affected. The Corps [citation omitted] has stated, ‘until such time as the tribes quantify their rights and consumptively withdraw their water from the Mainstem Reservoir System, the water is in the system.’ The Corps intends to operate the Missouri River using the water currently in the system.

Any future tribal rights settlements may require additional analysis of potential impacts on the Missouri River System.

Cumulative Effects

With respect to potential Indian water rights to the Missouri river, cumulative effects concern the amount of water that potentially would be available for other projects if tribes quantified their reserved rights. **Quantification could affect Project water users and other Missouri River water users with permits junior to Indian water rights.”** (Emphasis added) (Draft EIS, p. 4-25)

Obviously, the **Corps** is going to operate the Missouri River Mainstem Reservoir System using the water in the system. What the Draft EIS fails to address is the **Secretary of the Interior’s** responsibility under the Winters Doctrine to protect and preserve Tribal water rights to the Missouri River, or to consider that the Federal Government has had to make very substantial financial compensation payments to Tribes when the Secretary has failed to fulfill that responsibility in the past. Consequently, the Draft EIS does not address the fact that the Bureau and the State of North Dakota are deliberately proceeding with a Northwest Area Water Supply Project with the full knowledge that it (1) disregards Tribal water rights to the Missouri River established under the Winters Doctrine, (2) violates the Secretary of the Interior’s responsibility under the Winter’s Doctrine to protect Tribal water rights, and (3) could cost additional millions of dollars in compensation to the Tribes for Missouri River water used by the NAWS Project. The DEIS also does not discuss how the costs of compensation to the Tribes could affect the costs to water users and the economic feasibility of the project, nor does it consider alternatives that would avoid this objectionable feature of the project.

SUMMARY

Because the Draft EIS for the NAWS Project fails to (1) describe the potentially significant environmental impacts of the project, (2) consider alternatives to the project, (3) discuss cumulative impacts to the Missouri River, or (4) address the Secretary of the Interior’s responsibility under the Winters Doctrine to protect and preserve Tribal water rights to the Missouri River, the Draft EIS is inadequate on its face and deficient as a matter of law. Because the Draft so fundamentally fails to meet basic NEPA and other environmental law and treaty-related requirements, we believe the Bureau must set aside this draft and formulate a wholly new draft, properly scoped, to correct its deficiencies and to allow the public to have an opportunity to comment on the full range of issues and alternatives required by the CEQ regulations and the relevant federal laws.

Thank you for the opportunity to provide the views of the National Wildlife Federation on this document. If you have further questions regarding the views herein presented or any of the points

we have raised, please do not hesitate to call or write at: David Conrad, Senior Water Resources Specialist, National Wildlife Federation, 1400 16th Street, NW, Washington DC, 20036, phone 202-797-6697, or email at conrad@nwf.org.

Attachment A

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1305 Business Loop East
Jamestown, North Dakota 58401
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April 14, 2006

Re: Comments regarding scoping of the Draft Environmental Impact Statement for the Northwest Area Water Supply Project

Northwest Area Water Supply Project EIS
U. S. Bureau of Reclamation
Dakotas Area Office
P. O. Box 1017
Bismarck, North Dakota 58502-1017

Dear Sir or Madam:

The Environmental Assessment (EA) prepared for the Bureau of Reclamation's Northwest Area Water Supply Project (NAWS) by Houston Engineering, Inc., American Engineering, P.C., Montgomery Watson, and Bluestem Incorporated in 2001 failed to comply with the requirements of the National Environmental Policy Act in three fundamental and important respects:

1. The Environmental Assessment failed to describe adequately the environmental impacts of the proposed action.
2. The Environmental Assessment failed to consider alternatives to the proposed action.
3. The Environmental Assessment was not prepared by the Bureau of Reclamation or in cooperation with unbiased, independent contractors.

In order to comply with the requirements of the National Environmental Policy Act, it will be necessary for the Bureau of Reclamation to address each of these deficiencies substantively and objectively in the Environmental Impact Statement (EIS) that now is being prepared for the project.

Environmental Impacts of the Proposed Action

Section 102(2)(C) of the National Environmental Policy Act requires Federal agencies to prepare a "detailed statement" describing the environmental impacts of proposed actions significantly affecting the quality of the human environment, and the courts have confirmed that environmental impact statements are to be full disclosure documents.

The EIS must not only describe the environmental impacts that will occur in the immediate area of the project and the risk of impacts occurring in other areas, but it must provide a detailed discussion of the environmental impacts both in the local area and in other areas. Therefore, instead of concluding that, because the risks of transfer of invasive species from the Missouri River Basin to the Hudson Bay basin under NAWS are determined to be low, the impacts of biota transfer need not be considered, the EIS must provide a detailed discussion of the environmental impacts of such low probability/high consequence events.

The EIS must also include a detailed analysis of the cumulative impacts of the NAWS project on the Missouri River in terms of current authorized and proposed or anticipated future withdrawals from the river under a full range of conditions, including the operation of Red River Valley Water Supply Project Missouri River supply alternatives during prolonged droughts in the Missouri and Red River basins.

Alternatives to the Proposed Action

Section 102(2)(C)(iii) specifies that Environmental Impact Statements are to address “alternatives to the proposed action,” and Council on Environmental Quality Regulations and the courts have made it clear that Federal agencies are not simply to consider alternatives for implementing the proposed action, but they are to explore all reasonable alternatives to the proposed action. For example, in *NRDC v. Morton*, the U. S. Court of Appeals for the District of Columbia stated:

“Congress contemplated that the impact statement would constitute the environmental source material for the information of the Congress as well as the Executive, in connection with the making of relevant decisions, and would be available to enhance enlightenment of and by the public. The impact statement provides the basis for (a) evaluation of the benefits of the proposed action in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action.”

The EA for the NAWS project considered alternatives **FOR** supplying Missouri River water to eleven communities and five rural water systems in the Hudson Bay Basin of North Dakota, but it did not seriously consider alternatives **TO** supplying Missouri River water to those communities and rural water systems. The EA acknowledged that “sufficient groundwater supply is available in nearly every location of the NAWS area,” but the only alternative other than using Missouri River water considered in the EA was to drill more wells for six communities and to construct 18 separate reverse osmosis systems, one for each of the 13 communities (except Parshall) and five rural water systems in the NAWS project area.

Certainly, construction of 18 individual reverse osmosis systems to serve communities as small as Columbus (pop. 223), Noonan (pop. 231) and Souris (pop. 97) would be among the least feasible groundwater alternatives that could be designed. Even so according to the EA, this alternative would cost only \$27 million more the preferred alternative utilizing an integrated Missouri River supply for the communities and rural water systems in located in the Hudson Bay Basin. However, neither the EA nor the reports it cites considers alternative configurations utilizing integrated groundwater supplies that would reduce the number of wells and reverse osmosis systems needed.

For example, according to the EA, the projected 2010 combined 47,095 population of Minot and the Minot Air Force Base is 82 percent of the total combined population of the communities and

rural water systems located in the Hudson Bay Basin to be supplied with Missouri River water under the NAWS project. Therefore, one obvious alternative would be to increase the supply from the Sindre Aquifer and the capacity of the Minot water treatment facility by 21 percent to provide water to the additional 10,114 people in the small communities and rural water systems in the Hudson Bay Basin to be served by the NAWS project. Water could be distributed to those communities and rural water systems through the same 304 miles of distribution pipelines that would be used to deliver Missouri River water to them under the preferred alternative, and the cost savings from not building 45 miles of pipeline from the Missouri River and not building and operating the biota treatment plant could be used to expand the Minot water treatment facility. Of course, other alternatives utilizing integrated groundwater supplies also should be discussed and evaluated in the Environmental Impact Statement.

It should be noted in this context that the fact that Bureau violated NEPA by not adequately considering alternatives to the proposed action in its EA for the NAWS project may not be cited as an excuse for continuing to fail to evaluate alternatives to the proposed action in the Environmental Impact Statement. Consequently, the Bureau may not cite the fact that construction already is underway on the pipeline from the Missouri River to Minot to justify not considering alternatives **TO** the construction of a pipeline from the Missouri River to Minot.

Unfortunately, however, that is exactly what the Bureau is proposing to do in the Dakotas Area Office's *RECLAMATION Managing Water in the West, Northwest Area Water Supply Project* on "Environmental Impact Statement: Public Scoping," which states:

"Reclamation proposes to study and evaluate alternative **water treatment methods** to minimize the risk of transferring non-native biota **from the Missouri River Basin to the Hudson Bay Basin through the NAWS project.**" (Emphasis added)

Although the Bureau's decision to prepare an Environmental Impact Statement on the NAWS project is the result of a ruling by the U. S. District Court for the District of Columbia in a suit brought by the Province of Manitoba challenging the adequacy of the EA's discussion of impacts of the project in Canada and alternatives for minimizing those impacts, NEPA requires a full exploration of all reasonable alternatives, including alternatives **TO** delivering Missouri River water to the Hudson Bay Basin. Failure of the Environmental Impact Statement to address alternatives to the current NAWS project, including utilizing water supplies within the Hudson Bay Basin, objectively and substantively will render it inadequate under the National Environmental Policy Act and Council on Environmental Quality Regulations, and make it vulnerable to further litigation.

In order not to create additional bias against the full consideration of alternatives to the proposed action mandated by the National Environmental Policy Act, the Bureau should suspend all further construction on the NAWS project until full compliance with the Act has been achieved.

Eliminating Bias in the Preparation of the Environmental Impact Statement

Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act make it very clear that any Environmental Impact Statement:

". . . prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency . . . It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency **to avoid conflict of**

interest. Contractors shall execute a disclosure statement prepared by the lead agency . . . specifying that they have no **financial or other interest in the outcome of the project.**” (Emphasis added)

The EA for the NAWS project was prepared by private contractors for the North Dakota State Water Commission, the Garrison Diversion Conservancy District, and the Bureau of Reclamation. Both the North Dakota State Water Commission and the Garrison Diversion Conservancy District have mandates under North Dakota statutes to promote and pursue the diversion of water from the Missouri River into the Hudson Bay Basin of North Dakota. For example, North Dakota Century Code § 61-02-01.1 dealing with the State Water Commission directs that:

“The commission shall design the program to serve the long-term water resource needs of the state and its people and **to protect the state’s current usage of, and the state’s claim to, its proper share of Missouri River water.**” (Emphasis added)

Similarly, North Dakota Century Code § 61-24-01 establishing the Garrison Diversion Conservancy District declares the construction of the Garrison Diversion Unit to be a public necessity in order:

“To make available within the district, **waters diverted from the Missouri River** for irrigation, domestic, municipal, and industrial needs, and for hydroelectric power, recreation, fish, wildlife, and other beneficial and public purposes.” (Emphasis added)

The EA was prepared for the State Water Commission, the Garrison Diversion Conservancy District and the Bureau by Houston Engineering, Inc., American Engineering P.C., Montgomery Watson and Bluestem Incorporated, all of which have long histories of contractual relationships with the North Dakota State Water Commission, the Garrison Diversion Conservancy District, and others with vested interests in Missouri River diversion and which, consequently, have clear financial interests in the outcome of the NAWS project.

In order to avoid these clear conflicts of interest and institutional and contractual biases in the Environmental Impact Statement for the NAWS project, the Bureau must (1) prepare the EIS itself, (2) exercise sole authority in selecting any contractors, and (3) assure that any contractors are free of historical or current financial or contractual relationships with the State Water Commission, the Garrison Diversion Conservancy District, or others with a vested interest in the NAWS project and/or Missouri River diversion.

Sincerely,

Gary L. Pearson, D.V.M.